STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0059

In re the Marriage of: Lisa Marie Winkowski, petitioner,
Respondent,

vs.

J. Vincent Winkowski,
Appellant.

Filed September 7, 2021
Affirmed
Florey, Judge

Olmsted County District Court
File No. 55-FA-18-4416

Amber M. Lamers, Carrie J. Osowski, Dittrich & Lamers, PA, Rochester, Minnesota (for respondent)

Thomas R. Braun, Bruce K. Piotrowski, Restovich Braun & Associates, Rochester, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Reyes, Judge; and Florey, Judge.

NONPRECEDENTIAL OPINION

FLOREY, Judge

In this parenting dispute, appellant argues that the district court (1) infringed on his First Amendment rights by prohibiting him from posting videos of his children on the social media site, YouTube; (2) violated his Second Amendment rights by requiring that

his firearms be locked in a gun safe during his parenting time; and (3) erred by reopening its child-support order based on newly discovered evidence or fraud. We affirm.

FACTS

The marriage of appellant J. Vincent Winkowski and respondent Lisa Marie Winkowski was dissolved in Iowa in 2016. The parties have two minor children, born in 2009 and 2014. In 2018, respondent registered the Iowa custody determination in Olmsted County, Minnesota, and the Olmsted County District Court transferred venue of the case to Minnesota. Respondent is the primary custodian of the children. Appellant, who has remarried and has two more children, is a veteran with a 100% disability rating based on Post Traumatic Stress Disorder (PTSD) following his military service.

In 2019, appellant moved to modify custody and parenting time. Respondent filed a countermotion, asking for modification of child support and parenting time, orders preventing appellant from featuring the children in YouTube videos and requiring him to secure his firearms during parenting time, and release of medical information regarding appellant's disability rating. In June 2019, the district court issued an order denying a change in custody, modifying parenting time, and ordering appellant to refrain from featuring the minor children or naming them in YouTube videos and to remove YouTube videos of the children from his channel, "The Family Prepper." The district court also ordered appellant to lock his firearms in a gun safe during parenting time. Appellant appealed the order to this court.

In March 2020, this court issued an opinion affirming the district court's denial of custody modification but reversing and remanding its orders regarding the YouTube videos

and securing firearms for lack of sufficient findings. *Winkowski v. Winkowski*, Nos. A19-0941, A19-1323 (Minn. App. Mar. 23, 2020). In the meantime, appellant returned to district court asking for a reduction in child support because he had lost his job. After a hearing on February 3, 2020, the district court modified appellant's support obligation because of changed circumstances. On February 4, 2020, appellant began a new job. In April 2020, respondent moved to reopen the child-support order based on newly discovered evidence or fraud and asked the district court to amend certain findings because of error.

In December 2020, the district court addressed both the issues remanded by this court and respondent's motions for amended findings and to reopen the child-support order. The district court made additional findings to support its orders regarding the YouTube videos and securing firearms, as directed by this court, and reiterated its order prohibiting appellant from featuring the children in YouTube videos and requiring appellant to lock his firearms during parenting time. The district court also concluded that there was sufficient "newly discovered evidence and fraud" to reopen the March 2020 order modifying child support. This appeal follows.

DECISION

I. The district court's order prohibiting appellant from featuring his children in videos on the social media site YouTube did not infringe on appellant's First Amendment Rights.

We remanded the district court's order requiring appellant to refrain from posting and to remove previously posted YouTube videos featuring the children on his "The Family Prepper" YouTube channel because it was not supported by sufficient factual findings to permit review. The purpose of factual findings is to provide an appellate court with "a

clear understanding of the ground or basis of the [district] court's decision." *Transit Team, Inc. v. Metro. Council*, 679 N.W.2d 390, 398 (Minn. App. 2004). Appellant's challenge to the district court's order is two-pronged: he argues that the district court did not meet the standard for issuing an injunction and deprived him of his First Amendment rights.

A. Injunctive relief

We review the district court's grant of injunctive relief for an abuse of discretion. *Geske v. Marcolina*, 642 N.W.2d 62, 67 (Minn. App. 2002). "The threatened injury must be both real and substantial and the burden is on the moving party to establish the material allegations. Findings regarding entitlement to injunctive relief will not be set aside unless clearly erroneous." *Id.* (citation omitted). We defer to the district court's credibility determinations. *See* Minn. R. Civ. P. 52.01 ("[D]ue regard shall be given to the opportunity of the [district] court to judge the credibility of witnesses.").

"The district court has broad discretion in determining parenting-time issues and will not be reversed absent an abuse of that discretion." *Shearer v. Shearer*, 891 N.W.2d 72, 75 (Minn. App. 2017) (quotation omitted). The district court abuses its discretion when it misapplies the law or relies on findings not supported by the record. *Id.*

Before making its findings, the district court viewed five videos. The district court found (1) two videos tested "the penetration of certain types of bullets to kill people or included targets that are the 'closest to the average body cavity of an adult'" and referred to "defending yourself and your family from 'civil war' when the SHTF"; (2) a video about overnight camping showed the family in military camouflage and carrying weapons; it referred to securing the perimeter to protect the children from intruders and described how

appellant and his wife alternated sleeping and watching on a two-hour schedule to protect them; (3) in an introduction-to-shooting video, the older child was dressed in military garb and held a rifle; she appeared "uncomfortable," "spoke softly and tentatively," "did not make eye contact," and "appeared uneasy"; (4) the videos were not "fun" or "family friendly," but included information about which guns and bullets do the most damage, and encouraged the children to believe that they were not safe; and (5) the older child has been upset and afraid when appellant has spotted possible intruders and has taken her along to hunt for them in the dark.

The district court also found credible respondent's assertion that the children are put at risk of online predators, and the videos will tie them forever to "highly controversial beliefs and practices, even though the children may not share those beliefs." In addition, the district court considered appellant's PTSD diagnosis, which included the following symptoms: suspiciousness; impairment of judgment, impulse control and sleep; and anxiety. Coupled with its observations of appellant's demeanor in court and sworn statements, the district court found that the videos created enough concern about the emotional wellbeing of the children for it to limit or restrict appellant from featuring the children in the videos.

The district court's findings are supported by the record and its conclusion that it was proper to place restrictions on this aspect of appellant's parenting time because the videos were likely to endanger the child's emotional health or development is not a misapplication of the law.

B. First Amendment issues

Appellant next asserts that the order violates his rights under U.S. Const. amend. 1 and Minn. Const. art. I, § 3, both governing issues of free speech, and that the district court's findings are insufficient to support the order. "[T]he interpretation of the constitution is a purely legal issue that [an appellate court] reviews de novo." *Cruz-Guzman v. State*, 916 N.W.2d 1, 7 (Minn. 2018). "The free-speech protections of the Minnesota Constitution are coextensive with those of the First Amendment to the United States Constitution." *Rew v. Bergstrom*, 845 N.W.2d 764, 776 (Minn. 2014).

The First Amendment prevents government from proscribing speech or other expressive content, such as videos and photographs, because of "disapproval of the ideas expressed." *State v. Casillas*, 952 N.W.2d 629, 636 (Minn. 2020) (quotation omitted). But First Amendment rights are not absolute and are subject to some restrictions. *Id.* A content-based restriction is presumptively unconstitutional, unless it is "narrowly tailored to serve compelling state interests." *Id.* at 640 (quotation omitted). Such a restriction is subject to strict scrutiny. *Id.* A content-neutral restriction is subject to intermediate scrutiny and is constitutional if the restriction is narrowly tailored to serve a significant government interest and other channels to communicate the information remain open. *Id.* at 640-41.

The district court here has placed a content-neutral prohibition on appellant: appellant is prohibited from featuring the children in any YouTube video and is ordered to remove all his "The Family Prepper" channel YouTube videos featuring the children previously posted. Appellant was in no way restricted from expressing his views, only

from featuring his children in those videos. Further, appellant acknowledged to this court that protecting the emotional health and development of children under the court's jurisdiction is a compelling state interest.[1] *See* Minn. Stat. § 518.175, subd. 1(b). In *Geske*, this court approved of foreign decisions determining that "the best interests of children can be a compelling state interest justifying a prior restraint of a parent's right of free speech." 642 N.W.2d at 70. Here, the district court found that the older child was "uneasy" and "uncomfortable," and credited respondent's statements that the child was frightened.

The restrictions are narrowly tailored: appellant is free to create the YouTube videos and disseminate them so long as they do not include the children. The district court order is limited to "purely private matters," that is, images of these children, and not to matters of public interest, which implicate greater constitutional concern. *See Casillas*, 952 N.W.2d at 644. And, while these videos do not rise to the level of the "revenge porn" discussed in *Casillas*, nonconsensual internet images remain online and accessible to others and the children here have no say in consenting to these images, which will be accessible on the internet for years to come. *See id*. at 642.

The district court's findings are supported by the record; protecting the safety and emotional health and development of the children is a compelling state interest; and the district court's order is narrowly tailored to protect these children, while permitting appellant to continue to use YouTube to communicate his ideas. The district court's

[1] Even if prohibiting appellant from featuring the children in these videos could be construed as a content-based restriction, it would still survive strict scrutiny because the restriction is narrowly tailored to serve a compelling state interest; namely, protecting the emotional health and development of children.

decision is consistent with Minnesota's identification of the best interests of children as the paramount concern in all matters involving custody. *See, e.g.*, *Olson v. Olson*, 534 N.W.2d 547, 549 (Minn. 1995). The district court did not err by prohibiting appellant from posting these particular videos and ordering him to remove those previously posted.

II. The district court's order requiring appellant to secure his firearms in a gun safe during parenting time did not unconstitutionally infringe on his Second Amendment rights.

Appellant argues that the district court erred by ordering him to lock his firearms in a gun safe during parenting time because it unconstitutionally infringes on his Second Amendment rights. Appellant cites *District of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783 (2008) and *McDonald v. City of Chicago*, 561 U.S. 742, 130 S. Ct. 3020 (2010) in support of his argument.

The Second Amendment to the United States Constitution provides, "A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." The Supreme Court interpreted this to "guarantee the individual right to possess and carry weapons in case of confrontation." *Heller*, 554 U.S. at 592, 128 S. Ct. at 2797. The challenged law in *Heller* totally banned possession of handguns in the home and required that any lawful firearm in a home "be disassembled or bound by a trigger lock at all times." *Id.* at 628, 128 S. Ct. at 2817. The Court struck down the law, while acknowledging the continuing force of "longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 627,

128 S. Ct. at 2816-17. The Supreme Court extended this interpretation to the states through the Fourteenth Amendment in *McDonald*, 561 U.S. at 791, 130 S. Ct. at 3050.

The Minnesota Supreme Court acknowledged that the *Heller* and *McDonald* decisions extended Second Amendment protection to "the rights of law-abiding, responsible citizens to possess a hand gun in the home for purpose of self-defense, and is fully applicable to the State of Minnesota." *State v. Craig*, 826 N.W.2d 789, 792 (Minn. 2013).[2] The supreme court added, "But the right secured by the Second Amendment is 'not unlimited' . . . and the right to possess a firearm does not extend to 'any weapon whatsoever in any manner whatsoever and for whatever purpose.'" *Id.* (quoting *Heller*, 554 U.S. at 626, 128 S. Ct. at 2783). The supreme court quoted *Heller* in support of the continuing viability of certain reasonable restrictions on Second Amendment rights. *Id.*

"The deprivation of fundamental rights is subject to strict scrutiny and may only be upheld if justified by a compelling state interest." *LaChapelle v. Mitten*, 607 N.W.2d 151, 163 (Minn. App. 2000), *review denied* (Minn. May 16, 2000). This court determined that protection of a child's best interests is a compelling state interest. *Id.* at 163-64.[3] In so determining, a court must balance the general freedom from governmental intrusion against the state's need to intrude on that privacy. *Id.* at 164.

In making its findings, the district court found that respondent's evidence was more credible than that offered by appellant. The district court credited respondent's concern about appellant's "obsession with weapons, the abundance of weapons and ammunition

[2] *Craig* involved a challenge to the prohibition against possession of firearms by felons.
[3] Again, appellant acknowledged that this is a compelling state interest.

kept in his home within reach of the children, his failure to properly store weapons, his preoccupation with preparing for the end of the world and his poor decision making," and her examples of poor decision making while parenting, including lack of empathy, selfish and impulsive behavior, criminal behaviors, and lack of supervision during parenting time. The district court also viewed photographs of firearms kept in the open at appellant's home.

The district court concluded that under Minn. Stat. § 518.175, subd. 1(b), it had broad authority to determine parenting-time issues if a parent were likely to endanger a child's physical or emotional health. *See Newstrand v. Arend*, 869 N.W.2d 681, 688 (Minn. App. 2015) (recognizing that state has a compelling interest in a child's best interests in a parenting-time proceeding), *review denied* (Minn. Dec. 15, 2015); *LaChapelle*, 607 N.W.2d at 163-64.

Restrictions on a fundamental right must be no broader than necessary to advance a compelling state interest. *See Rew*, 845 N.W.2d at 784. Here, the district court has limited its order to requiring appellant to lock his firearms in a gun safe during parenting time; there has been no attempt to confiscate or permanently deprive appellant of his firearms. The district court's order is no broader than necessary to ensure that the children are not endangered during parenting time. Further, this court offered appellant the opportunity to move for a more tailored restriction that would permit hunting or target shooting, but he declined to do so.[4]

[4] Nothing in this opinion or the district court's order should be construed as prohibiting appellant from exercising his right of self-defense if an intruder breaks into his home. *See State v. Glowacki*, 630 N.W.2d 392, 402 (Minn. 2001).

III. The district court did not err by reopening its child-support order.

Appellant argues that the district court erred by reopening its child-support order based on newly discovered evidence or fraud. The district court may reopen an order if there is newly discovered evidence that "by due diligence could not have been discovered in time to move for a new trial," or based on "fraud, whether denominated intrinsic or extrinsic, misrepresentation, or other misconduct of an adverse party." Minn. Stat. § 518.145, subd. 2 (2020). A motion to reopen must be made within a reasonable time, and, for newly discovered evidence or fraud, must be made within one year. *Id*.

We review the district court's findings on fraud for clear error, and its decision to reopen a judgment for an abuse of discretion. *Hestekin v. Hestekin*, 587 N.W.2d 308, 310 (Minn. App. 1998). When a party seeks to reopen a ruling in a dissolution case within the time limits of Minn. Stat. § 518.145, subd. 2, the standard for reopening is ordinary fraud, not fraud on the court. *Doering v. Doering*, 629 N.W.2d 124, 129 (Minn. App. 2001), *review denied* (Minn. Sept. 11, 2001). "Ordinary fraud, in a dissolution context, does not require an affirmative misrepresentation or an intentional course of concealment because parties to a marriage dissolution have a duty to disclose all assets and liabilities completely and accurately." *Id.* at 130.

On January 13, 2020, appellant filed an affidavit in support of his motion for a reduction in child support. He averred that his PTSD made it difficult for him to work and that his 100% disability rating was based at least in part on his inability to hold suitable employment. He described his problems maintaining employment. Appellant stated that he applied for 26 jobs between October 2019 and the date of the affidavit, January 10,

2020, and that he and his current wife decided he should be a stay-at-home parent and raise food on a hobby farm. Within two weeks of filing this affidavit, appellant was completing paperwork for a job to begin one day after the hearing on his motion to modify child support. He failed to comply with his duty to correct this affidavit. *See* Minn. R. Civ. P. 26.05 (stating that a party has a duty to amend a prior response to an interrogatory if the response is incomplete or additional information has not been made known to the other party).

On February 3, 2020, the district court heard appellant's motion. On February 4, appellant began a new job. Appellant avers that he did not know he had the job until February 4, and his manager submitted an affidavit to that effect, but his employment application states that he would be available to start work on February 4; other paperwork for the job was completed on January 19, 2020; and he took a drug test for the job on January 23. He did not inform the district court that he had found employment the day after the hearing.

The district court's findings are supported by the record and are not clearly erroneous. According to the standard set forth in *Doering*, proof of ordinary fraud does not require an affirmative or intentional misstatement; a failure to disclose is sufficient. 629 N.W.2d at 130. The district court's decision to reopen the child-support-modification order was not an abuse of discretion.

Affirmed.